SUPREME COURT, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-5119

Gladys Farmer and
Walter B. Farmer,
Petitioners,

v.

The Toledo Edison Company,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a purchase, by an agency vested under state law with the power of eminent domain, of real property or an interest therein through a privately concluded agreement and conveyance without commencement of any condemnation proceeding constitute a "taking" governed by the Fifth and Fourteenth Amendments to the Constitution of the United States and subject to retrospective review by state courts?

Is a person who voluntarily agrees to the sale of his real property or an interest therein to an agency vested under state law with the power of eminent domain and who thereafter decides that his compensation was insufficient barred by his agreement from asserting a claim, based on the Fifth and Fourteenth Amendments requirements of due process and just compensation?

When the trial court, being the sole trier of facts, has refused to find facts to support the contentions upon which a petition for writ of certiorari ostensibly depends, will this Court substitute its judgment or that of the petitioner as to what the facts are for that of the trial court?

STATEMENT OF THE CASE

This is an action commenced by Gladys and Walter Farmer, petitioners, to rescind an instrument conveying an easement for electric transmission-line purposes over a 0.41 acre portion of their twenty-acre farm in Carroll Township, Ottawa County, Ohio, to The Toledo Edison Company, respondent. They sought in the alternative a jury trial to determine their compensation and damages to the residue, presumably according to the procedures employed in an action for appropriation.

Petitioners' amended complaint contained two claims for relief. The first claimed that the easement had been acquired by actual, not constructive, fraud based on an averred statement by an agent of Toledo Edison, in response to a question by the Farmers, that no "damage to the residue" would result from the easement. The second claimed that, because the consideration for the easement had not been paid prior to or at the time of its delivery and recording, the Farmers had the right to rescind the instrument unilaterally by expressing their intent to do so.

Respondent moved to dismiss for failure to state a claim upon which relief could be granted pursuant to Rule 12(B) of the Ohio Rules of Civil

Procedure and subsequently for summary judgment pursuant to Rule 56 of those rules. The trial court denied both motions as to both claims for relief.

On April 5 and 6, 1972, the case was tried to the court. On July 7, 1972 the trial court entered judgment for the petitioners, ordering rescission of the easement. On August 21, 1972, the trial court overruled respondent's motion for new trial.

The trial court, at respondent's request, made separate findings of fact and conclusions of law which specifically rejected the proposed findings of both parties. Petitioners' proposed findings included the contentions of fact contained in their Statement of the Case filed in this Court as a part of their Petition for Writ of Certiorari. These contentions are neither supported by the evidence nor included in the trial court's findings.

Instead the trial court found:

> "That the plaintiffs gave to the defendant a deed for an easement across their property for the sum of $125.00.
>
> "The Court has received from the parties their proposed separate findings of facts and conclusions of law. After

carefully reading and re-reading said findings the Court is unable to adopt either for the reason that the finding of facts in both of the suggested ones are not supported by evidence which the Court can believe. However, the Court does find that an easement was given, as stated above, and that the plaintiffs received $125.00 therefore.

"The Court further finds that an independent appraiser fixed the value of the easement and damage at many times higher than the $125.00, to-wit:

"The Court further finds that the negotiator, so-called, was sent out with a sum certain to be paid, that the negotiator had no more knowledge of the property than any other person, that he had no appraisement given by the company and any statement made was without any foundation as to value and/or damage. The Court does find that he made a statement that suit would be brought unless the property was purchased.

"The Court further finds that the plaintiffs herein

gave some credence to what was said by the negotiator.

"The Court further finds that the Toledo Edison had the power of condemnation and that the plaintiffs were bound to accept what a jury would find."

It then concluded with respect to the law:

"It seems to this Court, while he can find no decisions to substantiate what he says, that a utility company should be compelled to have an appraisement made and a knowledge of the value and effect on the easement when they send people out to negotiate and that the Toledo Edison pay a price, at least a fair price, for the reasons that they are not standing on an equal basis with the seller, and that they cannot deal on a willing buyer and seller basis because the landowner is not a willing seller.

"Therefore the Court finds that the deed should be set aside and that either the Toledo Edison properly negotiate or the cause be set for trial."

Respondent appealed on questions of law. The Court of Appeals for Ottawa County reversed the decision of the

trial court, holding that respondent's first three assignments of error were well-taken. These were as follows:

ASSIGNMENT OF ERROR NO. 1

The trial court erred in ordering rescission of an instrument conveying an easement from appellees to appellant where the court found that there was insufficient evidence to support the averments of fraud and non-payment contained in the complaint and where the court made no findings of fact sufficient to support the rescission.

ASSIGNMENT OF ERROR NO. 2

The trial court erred in holding that, as a prerequisite to the acquisition of a valid easement by an agency with the power of eminent domain, the agency must, as a matter of law, have an appraisal made of the property, a knowledge of the effect of the easement on its value, and pay for the easement according to the indefinite standard of "at least a fair price".

ASSIGNMENT OF ERROR NO. 3

> The trial court erred in ordering appellant to re-negotiate with appellees for the purchase of the voided easement or, in the alternative, to have the compensation for the ease-ment set by a jury.

The remaining two assignments of error, relative to the trial court's decisions on the motions to dismiss and for sum-mary judgment, were held to be either not prejudicial or not well-taken. In so ruling the court of appeals also held that the easement instrument is valid for all purposes stated therein.

Petitioners then filed a motion in the Supreme Court of Ohio to certify their case to that court. Their origi-nal memorandum in support of their motion to certify set forth a single proposition of law.

> "Where a utility company obtains the signatures of prop-erty owners to an easement for an electric transmission tower line on the express represenita-tion that there would be no damage to the remaining land and such easement form contains no reference to and no release of the owners' right to damage to the remaining land, the owners

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ruled
witho

re entitled to a jury trial
o determine the damage, if
ny, to remaining land pursuant
o the rights afforded by Arti-
le One, Section 19 of the Ohio
onstitution and the require-
ent of just compensation under
he Fifth Amendment to the
nited States Constitution."

ubsequent reply memorandum they
two additional propositions for
eration of the court:

"A property owner stands
efore the law with as many
ights as a criminal, and the
ailure of a utility company
o advise him of his constitu-
ional rights cannot deprive
im of a jury trial.

"The purchase of an ease-
ent for a tower transmission
ine is not a 'private' trans-
ction because the Buyer has
he right to condemn the prop-
rty and the Seller is not a
illing party, and as a result
he utility company is obligated
o give truthful answers to
uestions regarding damage to
esidue."

he Supreme Court of Ohio over-
petitioners' motion to certify
t comment on April 20, 1973.

Respondent has not yet taken possession of the property pursuant to its easement; and it has never filed any action to appropriate the easement.

Petitioners now claim that they are entitled to have the decision of the Supreme Court of Ohio reversed on the basis of a right to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. While the Fifth Amendment was mentioned in several memoranda submitted by petitioners to the trial court, it was cited as a provision controlling appropriation cases in which category the instant case did not fall. Nothing in the amended complaint (contained in the record transmitted to this Court) suggested the presence of any constitutional questions. Likewise, petitioners' proposed conclusions of law failed to mention the applicability of either the Fifth or Fourteenth Amendments, stating only, with respect to the Ohio Constitution:

> "1. The Constitution of the State of Ohio, Article 13, Section 5, provides[:]
>
> > 'No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first paid in money...'
>
> "2. A public utility such as

the Toledo Edison Company in acquiring easements for construction and maintenance of transmission lines designed to carry approximately 345,000 volts must comply with the Constitution of the State of Ohio and pay full compensation therefor.

"3. The compensation required by the Constitution to be paid to the owner is a compensation for the loss sustained by him. This loss does not necessarily consist alone in the value of or damage done to the property actually taken and appropriated. The remaining and adjacent land belonging to the owner may be greatly injured and depreciated in value by the appropriation."

The decision of the trial court which followed was not based on the applicability of any provision of the Constitution but on its own views of public policy and the relative positions of the parties hereto.

Although petitioners argued in the court of appeals and the Supreme Court of Ohio that the trial court's decision complied with the requirements of the Fifth Amendment, no authority was cited to support that conclusion.

ARGUMENT

A. Petitioners Have Neither Properly Raised Nor Presented Any Federal Question.

As the preceding statement of the case indicates, petitioners' presentation of a federal question in the lower courts was made only as a last resort, primarily raised in a motion to certify to the Supreme Court of Ohio and always without citation of authority to support any of the numerous implications of their suggested conclusions. For this reason, petitioners are unable to comply in their statement of the case with Rule 23(f) of the Supreme Court Rules which provides in part:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they

> were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioners make no reference to their time or manner of raising the federal questions which they seek to have reviewed. They make no reference to the method of raising such questions. They make no reference to any portions of the record where the questions were raised. And, because the questions were neither presented to nor decided by the trial court or the court of appeals, petitioners, of course, have made no reference to how the federal questions were passed upon by those courts. Having failed to present to the lower court the questions they now seek to raise, petitioners are attempting to gloss over the requirements of Rule 23(f) with a blanket statement that the Fifth Amendment was cited throughout the lower court proceedings.

B. Petitioners' Statement of Questions Presented and Argument Raise No Substantial Federal Question.

Petitioners' questions presented and their arguments suffer from the defect of having no basis in either law or fact.

It should be noted at the outset that their statement of the case, questions presented, and arguments rely on the numerous factual assumptions contained therein. Their utilization of these factual contentions contradicts the findings of the trial court which found that there was insufficient evidence to support them.

It has been consistently held that appellate courts will not substitute their judgment as to what facts were proved at trial for that of the trial court. In Aunt Mid, Inc. v. Fjell-Orange Lines, 458 F. 2d 712 (CA7 1972) the court stated:

> "Upon analysis it appears that plaintiff Aunt Mid was really seeking a trial de novo on this appeal. However, '[t]his Court, upon review, will not retry issues of fact or substitute

> its judgment with respect to such issues for that of the trial court. ... In determining whether there is a sufficient evidentiary basis for the court's findings of fact, we must take that view of the evidence and the inferences deducible therefrom which is most favorable to the...[party prevailing below].' Cleo Syrup Corp. v. Coca-Cola Co., 139 F.2d 416, 417-418 (8th Cir. 1943), cert. denied, 321 U.S. 781, 64 S.Ct. 638, 88 L.Ed. 1074 (1944). Accord: Shapiro v. Rubens, 166 F.2d 659, 665, 666 (7th Cir. 1948)."
> (p. 718)

Argument herein thus must be limited to the law which is to be applied to a given set of facts.

Petitioners claim that the Fifth and Fourteenth Amendments to the Constitution of the United States required respondent to pay "just compensation" for the easement rights acquired by it and for damages to the residue and that this was not done. They then contend that this principle of law and conclusion of fact justify the relief granted by the trial court. The trial court found, however, that petitioners had conveyed an easement and received compensation therefor. The court did not find that the compensation was

either unjust or inadequate but essentially by its remaining findings and conclusions questioned respondent's basis for determining amounts to be offered to landowners for easements over their property. The court further did not find that respondent's acts constituted a taking or that any possession or occupation of the property had occurred pursuant to the easement. Thus, assuming that the constitutional requirements of just compensation and due process apply to privately agreed conveyances to a corporation vested by state law with a limited power of eminent domain, it is nevertheless true that the trial court's findings of fact leave petitioners with no basis for their arguments in this Court.

This assumption, itself, however, could result only from a totally deficient analysis of the constitutional provisions cited and existing authority. Petitioners have cited no authority for the proposition that a privately agreed conveyance for an agreed compensation results in a taking within the meaning of that term as it appears in the Fifth Amendment. Neither have they cited any authority to support the proposition that the Fifth and Fourteenth Amendments free them from their contract and conveyance. To the extent that these propositions have been discussed in this and other courts they have been decided adversely to petitioners'

position herein.

In Albrecht v. United States, 329 U.S. 599 (1947) the Government in a land-purchase contract stipulated the purchase price, without provision for interest. In a subsequently instituted condemnation proceeding, the government sought to avoid the contract arguing in part that the agreed compensation exceeded that required by the Fifth Amendment. The landowners asserted their contract rights; and, when, in another case, the validity of a similar contract was established, the Government deposited the stipulated price. The landowners then further claimed interest pursuant to the condemnation statute and the Fifth Amendment requirement of just compensation. There the Court stated in its syllabus:

> "The Government is not obligated in these circumstances to pay interest, since the compensation of the landowners is controlled by the contracts, which contained no provision for interest, rather than by the Fifth Amendment."

Mr. Justice Black, delivering the opinion of the Court further explained:

> "The Fifth Amendment does not prohibit landowners and the Government from agreeing

between themselves as to what is just compensation for property taken. See Danforth v. United States, 308 U.S. 271. Nor does it bar them from embodying that agreement in a contract, as was done here. * * *

"The answer to their contention is that in this posture of the cases these transactions have passed out of the range of the Fifth Amendment. * * * Exactly what factors the parties consider, in addition to bare value, cannot easily be ascertained. * * * And other factors, which need not be enumerated, entered into the contract prices. These things demonstrate the inadvisability of applying a constitutional rule as to interest, specially designed to enable courts to calculate 'just compensation,' to an entirely different situation in which parties, supposedly with due regard to their own interests, bargain between themselves as to compensation. * * *

(pp. 603-604)

The landowners, having asserted the contract as a defense in the condemnation proceedings were limited thereby and barred from claiming

additionally the ordinary remedies available in a condemnation proceeding. Having failed to establish by conventional principles the invalidity of its contracts, the government was barred from claiming that the agreed price was more than the just compensation which the Fifth Amendment requires. Similarly petitioners herein, having failed to establish by conventional equitable and legal principles the invalidity of their agreement and conveyance, are now barred thereby from claiming the additional protection of the Fifth Amendment to obtain a compensation different from that to which they agreed.

While Albrecht refused to apply the Fifth Amendment to a situation in which there had been an agreed compensation and implied the absence of a taking, one federal court has further stated that under the circumstances of an agreement, no taking exists. In Niagara Falls Bridge Commission v. United States, 76 Fed. Supp. 1018 (Ct. Claims 1948) the plaintiff sued for rent for quarters occupied by the Customs Service and the Immigration Service. There the court stated:

> "Furthermore, if the United States occupies a person's premises, it is, ordinarily, liable for the rental value thereof even though it occupies them against the will of the owner

> and without an intention on the part of the United States to pay rent. This liability arises under the Fifth Amendment prohibiting the taking of private property without the payment of just compensation. * * *
>
> "However, if a person occupies another's premises with the understanding on the part of both parties that no rent is to be charged therefor, then, of course, no contract to pay rent can be implied, nor is there a taking of property for which the Fifth Amendment requires the payment of just compensation."
>
> (p. 1019)

Thus, although no such understanding was found to exist, the court viewed a private agreement and the resulting occupation as being inconsistent with the constitutional concept of a taking.

The implications of petitioners' argument are as catastrophic as a matter of public policy as they are wrong as a matter of law. The trial court's ruling required, as a prerequisite to the validity of a conveyance to an agency with the power of eminent domain, that the agency have an appraisal made of the property conveyed, that it acquire a knowledge of the value of the property

and the effect of the conveyance on the value of its residue, and that it pay for the property acquired according to the indefinite standard of "at least a fair price."

If this were to be justified by application of the Fifth and Fourteenth Amendments as petitioners argue, their argument further requires this Court to place their conveyance within the definition of a taking. Article I, §19 (Petition for Writ of Certiorari, p. 19) of the Constitution of Ohio requires a jury trial in the event of a taking. Thus, an application of this definition to Ohio law, for which petitioners now argue, would require a judicial proceeding to confirm every conveyance to an agency vested with the power of eminent domain. The uncertainty generated by the trial court's requirements would likewise require a judicial proceeding to guarantee good title to the property conveyed. With respect to conveyances already completed, the ruling would invalidate a large number of those where the previous owners' claims are not barred by the statute of limitations.

On the basis of the foregoing authority and analysis it appears that petitioners' argument, for which no relevant authority has been cited, is unsupportable as a matter of law. It further appears that the intent of the Fifth Amendment is to assure persons

of just compensation when their property is taken by judicial proceedings or in a manner to which they in no way consent. It is not to protect them from the consequences of any errors in judgment which they in retrospect feel that they have made by their privately concluded agreement. Thus, petitioners have raised no substantial or previously undecided federal question.

CONCLUSION

Respondent therefore requests that the petition for writ of certiorari to the Supreme Court of Ohio be denied and that petitioners be charged with the costs of this action.

Respectfully submitted,

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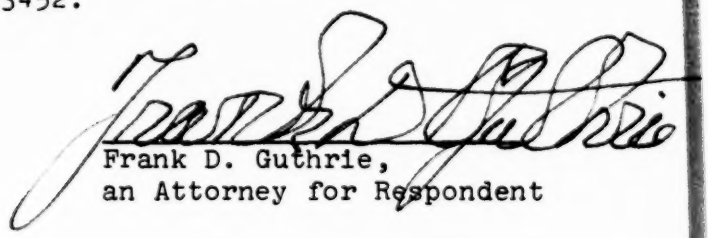
CERTIFICATE OF SERVICE

Three (3) copies of the foregoing brief of respondent have been deposited in the mail with first class postage prepaid this 17th day of August, 1973, to Thomas L. Corogin, attorney for petitioners herein, at his office at 128 Madison Street, Port Clinton, Ohio 43452.



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